rent in question (including any amount due, but not paid, prior to the service of the notice).

272(3) Where any chargor on whom a notice in Form 16K is served fails within the period specified in that behalf in the notice to admit, or secure the admission of, the chargee into occupation of the land in question, the chargee may apply to the Court for an order for possession in accordance with the provisions of any law for the time being in force relating to civil procedure.

It will be seen that ss 271 and 272 so clearly and unmistakeably give a right to the chargee to oust the chargors from their possession of the charged land, such that any further comment from me would be superfluous in view of such express words contained in them. Section 270(1)(b) of the Code, however, would be totally repugnant to such right, and would make nonsense of ss 271 and 272. Only by disregarding the word 'not' in s 270(1)(b) would make it consonant with ss 271 and 272 as in the manner shown below:

... the powers of recovering possession by a chargee ... should be exercised only in so far as the land is 'not' occupied by the chargor.

The crossing out of the word 'not' above would denote my disregard of it. I give now my reasons for disregarding it.

In the first place, while that august body of Parliament (for which the court has the greatest respect) made laws, the laws would have been undoubtedly and in fact drafted by legal officers. Sometimes, drafting of such legislation would be delegated to comparatively junior legal officers. This well-known fact coupled with potential human errors of such draftsmen and printers also could give rise to defective language, misprints and misnomers in any act of Parliament.

Secondly, we had such a repugnancy posed by ss 271 and 272, on one hand and s 270(1)(b) on the other. Applying the purposive method of construction of statutes as explained by Lord Diplock in *Kammins* v *Zenith Investments*[1] at pp 880 and 882, the court asked itself the question as to what was the subject matter of the said Chapter 4 of the Code? What objects if any, in relation to that subject matter, did Parliament intend to achieve? Undoubtedly Parliament intended to give a right to a chargee to, inter alia, claim possession by going into actual occupation of the charged land or alternatively to obtain possession symbolically in the case of an existing tenant of a chargor being in occupation, so as to assign all the rights of the chargor in regard to the tenancy to the chargee thereby enabling the chargee to receive the rent etc.

Another object would appear to be to prevent chargors of land office titles from being evicted from their homes. The said land herein was held at all material times under a registry title.

The courts in the past have never refrained from holding, in regard to express words in a statute, that 'or' should mean 'and'; 'shall' should mean 'may' and vice versa. A case in point is *Metropolitan Board of Works* v *Steed*,[2] in which the word 'or' was read by the court as 'and'. I therefore held that the word 'not' as described above ought to be disregarded when reading s 270(1)(b) so that the said land presently in occupation of the chargors would be thus amenable to a claim for possession under s 271(1)(b) of the Code.

Consequently I made an order in terms of the application by the chargee for an order of possession and further directions in connection therewith. The court further certified that it required no further arguments in open court on application by the husband/chargor for such further arguments. The court further granted leave to appeal to the Supreme Court on such an application from the same chargor who also asked for stay of execution. The court granted such stay of execution also after hearing all the parties hereto. The stay granted was for a period of one month from the date of judgment unless a notice of appeal was filed against my judgment in which case the stay would be extended until the conclusion of the hearing of the appeal.

Order accordingly.

Solicitors: *Chong, Poh & Lim*; *RJ Esa & Co.*

Reported by *Wong Kim Fatt*

Hiap Yiak Trading Sdn Bhd & Ors v Gim Hin & Co (M) Sdn Bhd

HIGH COURT (MUAR) – ORIGINATING MOTION NO 38-18-1988
EUSOFF CHIN J
24 FEBRUARY 1989

Civil Procedure – Whether affidavits which are not affirmed and filed after a summons is issued may be used in support of the application – UK Rules of the Supreme Court, O 28 r 1A – Rules of the High Court 1980

Land Law – Entry of caveat on land – Need to prove a claim to a title or registrable interest in the land or a right to such title or registrable interest – Ineffectiveness of prohibitive order registered against land – Where the registered owner has no beneficial interest in the land – National Land Code 1965, s 323

By an agreement of sale of land, the registered proprietor of land agreed to sell the land to the first four applicants. The agreement contained an option for the registered proprietor to repurchase the land by a certain time. This option was not exercised and, after negotiations, the parties agreed to extend the option. After further discussions, a supplementary agreement was entered into pursuant to which the option was subse-

quently further extended but not exercised by the registered proprietor.

The registered proprietor then executed a memorandum of transfer in favour of the applicants' nominee, the fifth applicant to whom the first four applicants had, in turn, sold the land.

The memorandum of transfer was presented for registration at the land office but could not be registered because the respondent had filed a caveat on the land for the reason that the registered proprietor was owing the respondent some moneys, being the balance of the purchase price for goods sold and delivered by the respondent to the registered proprietor. For this reason the respondent had also registered a prohibitory order on the land.

The applicants filed an application to remove the caveat and prohibitory order lodged by the respondent. At the hearing of the application, the respondent raised a preliminary objection that the affidavits supporting the applicants' originating motion could not be used as they were not signed after the filing of the motion. The respondent further alleged that the first four applicants could not be genuine purchasers as (i) they did not lodge caveats on the land to protect their interests upon the signing of the first sale agreement but had waited one and a half years later before they did so; and (ii) the completion of the sale had been many times postponed and the purchase price reduced from $400,000 to $340,000.

Held, allowing the applicants' application:

(1) There is no equivalent in the Malaysian Rules of the High Court 1980 of O 28 r 1A of the UK Rules of the Supreme Court which requires affidavits in support of an application to be filed after the summons was issued. Only Malaysian rules should be used and procedures adopted by the English courts should not be slavishly followed unless the Malaysian rules book contains similar provisions.

(2) In any event, when the respondent registered its caveat, the applicants had already lodged two caveats against the land.

(3) It was understandable that the registered proprietor needed money to pay off his loans to a bank to save his land from being auctioned. Hence the sale agreements gave the registered proprietor options to repurchase the land.

(4) The registered proprietor had signed transfer documents transferring the land to the applicants and the transfer could have been registered but for the caveat lodged and the prohibitory order registered by the respondent.

(5) Since the purchase price of the land had been paid in full by the applicants and the transfer documents had been executed and delivered to the applicants' solicitors, the registered proprietor was therefore holding the land as a bare trustee for the applicants.

(6) The respondent, not being any of the persons or bodies enumerated under s 323 of the National Land Code, is precluded from entering a caveat on the land. It is for the respondent to prove that it has a claim to a title or registrable interest in the alienated land, or a right to such title or registrable interest. The respondent was unable to provide proof of any of these. Therefore, the caveat entered by the respondent had to be removed.

(7) The prohibitory order registered on the land at the instance of the respondent had also to be removed as it was ineffective because the registered proprietor no longer had a beneficial interest in the land.

Cases referred to

1 *Guan Wee Keang* v *Gan Ah Ter* [1986] 1 CLJ 557 (folld)
2 *Meriam binti Yaacob & Ors* v *Shell Malaysia Trading Sdn Bhd* [1984] 2 MLJ 31 (folld)
3 *Registrar of Titles, Johor* v *Temenggong Securities Ltd* [1976] 2 MLJ 44 (folld)
4 *UMBC* v *Goh Tuan Laye & Ors* [1976] 1 MLJ 169 (folld)

Legislation referred to

National Land Code 1965 s 323
Rules of the High Court 1980
Rules of the Supreme Court [UK] O 28 r 1A

Wong Kim Fatt for the applicants.
Tok Chin Hai for the respondent.

Cur Adv Vult

Eusoff Chin J: By an agreement of sale of land dated 22 April 1985, Hong Soon Seng Sdn Bhd, the registered proprietor of land lot 3019, EMR 3216, mukim of Bakri, agreed to sell its land to the first four applicants for $400,000. On the instruction of the registered proprietor, the $100,000 deposit for the purchase price had been paid by the purchaser into the United Asian Bank (UAB) Melaka on 21 April 1984, towards the discharge of the registered proprietor's loan account with the UAB and towards the redemption of the said land from that bank. The land would have been auctioned by the bank if the $100,000 was not paid to the bank. On 22 May 1984, the purchasers on instruction of the registered proprietor paid another $240,000 in the UAB to the account of the registered proprietor.

In the agreement of sale, the registered proprietor was given an option to repurchase the land from the purchasers before 20 October 1984, by the registered proprietor's refunding the $340,000 paid by the purchasers, and in addition, to pay the purchasers an extra $100,000 as compensation. The registered proprietor failed to exercise the option to repurchase, and after negotiations, the parties agreed to extend the option to repurchase the land to 20 December 1984. After further discussions between the parties, the registered proprietor agreed to sell the land for $340,000 as per their agreement dated 22 April 1985. Again the registered proprietor was given the option to repurchase the land by 20 October 1985 subject to payment of compensation to the purchasers, which date was extended to 31 October 1987 by a supplementary agreement dated 5 January 1987.

The purchasers had made searches on the said land, and found that the land was free from encumbrances up to the signing of the supplementary agreement on 5 January 1987, except for the existence of a charge in favour of UAB. The attorneys of the UAB had executed a memorandum of discharge of charge, and handed it to the purchasers together with the land title.

On 27 October 1985 and 10 August 1986, the second and third applicants respectively had registered private

caveats to protect their interests in the land. The registered proprietor had then executed a memorandum of transfer of their land in favour of the purchasers or their nominees. The purchasers in turn by agreement of sale dated 25 April 1985 sold their land to the fifth applicant who in turn executed sale agreements with five sub-purchasers.

The memorandum of transfer was presented on 20 August 1988 for registration at the land office. It could not be registered because the respondent had filed a caveat on the land on 8 March 1987. The reasons given by the respondent when filing the caveat against the land was that the registered proprietor, Hoong Soon Seng Sdn Bhd, was owing the respondent $169,717.37 being balance of purchase price for goods sold and delivered by the respondents to the registered proprietor. For the same reason the respondent had also registered a prohibitory order on the land on 29 May 1988 for six months and subsequently extended.

The applicants filed this application to remove the caveat and prohibitory order lodged by the respondent.

The respondents raised a preliminary objection saying that the affidavits supporting the originating motion cannot be used because they were not signed after the filing of the motion. The notice of originating motion was filed on 22 October 1988, whereas the two affidavits supporting the motion was affirmed by the first applicant on 18 October 1988, and by the fifth applicant on 3 September 1988. The respondent's learned counsel cited *Atkin's Court Forms* (Civil Proceedings), 2nd Ed, Vol 29, and O 28 r 1A of the UK Rules of the Supreme Court (RSC). I overruled this objection. We have no equivalent of the UK O 28 r 1A under the Malaysian Rules of the High Court 1980. We should use only our own rules and not follow slavishly what procedures are adopted by the English courts unless our rules book contains similar provisions as theirs. The UK RSC (Amendment No 3) 1982 by the addition of a new rule called r 1A requires affidavits in support of the application to be filed after the summons was issued. But even so, the practice in the English courts is that the court will still accept such affidavit even though it is sworn after the commencement of the proceedings (see the UK *Supreme Court Practice*, 1985, p 450 under the heading 'Affidavit in Support').

The respondent alleged that the first four applicants could not be genuine purchasers since they did not lodge caveats on the land to protect their interests upon signing of the first sale agreement, but had waited until 27 May 1985, ie about one and half years later before they did so. In any event when the respondent registered their caveat on 8 March 1987, the purchasers' two caveats were already on the land register.

The respondent also alleged that the sale to the first four applicants could not be genuine because the completion of the sale had been many times postponed, and that the purchase price of $400,000 was reduced to $340,000. Further, when the land was to be auctioned under the order of the Collector of Land Revenue dated 18 May 1984 at the instance of the UAB, the reserved price of the land was $700,000. It is understandable that the registered proprietor needed money to pay off his loans to the UAB to save his land from being auctioned. Hence the sale agreements gave the registered proprietor the options to repurchase the land. The registered proprietor had signed transfer documents transfering the land to the purchasers, and the transfer could have been registered but for the caveat lodged and prohibitory order registered by the respondent. Since the purchase price of the land had been paid by the purchasers on 22 May 1984, and the transfer documents of land had been executed and delivered to the purchasers' solicitors, the registered proprietor was therefore holding the land as a bare trustee for the purchasers.

The respondent, not being any of those persons or bodies enumerated under s 323 of the National Land Code, is precluded from entering a caveat on this land. It is for the respondent to prove that it has a claim to a title or registrable interest in the alienated land, or a right to such title or registrable interest. The respondent has been unable to provide proof of any of these. See *Guan Wee Keang* v *Gan Ah Ter*.[1] The caveat entered by the respondent has to be removed and I so ordered.

I also ordered that the prohibitory order registered on the land at the instance of the respondent be removed as it is ineffective because the registered owner now has no beneficial interest in that land – *Meriam binti Yaacob & Ors* v *Shell Malaysia Trading Sdn Bhd*,[2] *Registrar of Titles, Johor* v *Temenggong Securities Ltd*,[3] and *UMBC* v *Goh Tuan Laye & Ors*[4] at p 170.

Order accordingly.

Solicitors: *E Ramasamy & Co*; *Tok & Co*.

Reported by *Yap Shao Sin*